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No. 74-1254

Supreme Court of the United States

OCTOBER TERM, 1975

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO and MARITIME LOCAL UNION No. 8-801, *Petitioners,*

v.

MOBIL OIL CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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At the outset of its argument, Respondent Mobil Oil Corporation acknowledges that in enacting §14(b) "Congress intended that each State [and Territory] develop its own [union security] policy," and that union security provisions regulate a facet of the "employment relationship". (Resp. Br., p. 14; Compare Pet. Br., pp. 19-20.) The Company's starting points serve to delimit the dispute between the parties. From recognition that §14(b) states a policy of neutrality with regard to the validity of union security provisions, it follows that each jurisdiction's law is restricted

to employment relationships centered there. (Cf. Resp. Br., p. 16.) To permit one jurisdiction to reach out and regulate an employment relationship centered in another jurisdiction with a contrary union security policy would undermine the equal status Congress conferred on each law-giving authority. Thus, the first issue in controversy here is what are the factors which determine the site of the employment relationship.

1. The language of § 14(b) clearly dictates the conclusion that the factor that determines the site of the employment relationship is the location at which the employees covered by the agreement perform all or substantially all of their work. For the provision states:

> "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization *as a condition of employment in any State or Territory* in which such execution or application is prohibited by State or Territorial law."

The ordinary meaning of this language is surely that an individual is "employed in" the jurisdiction in which he performs his work. Thus, where an employment relationship touches more than one jurisdiction, the governing law on union security is that of the jurisdiction in which the employees perform their work.

This reading of § 14(b) gives effect to all the words in the provision. For, as we explained in our opening brief (Pet. Br., p. 25), the permission granted by §14(b) to the states and territories to prohibit both "execution or application" allows the jurisdiction in which the work is performed to prohibit execution independently of application, and thereby provides a vehicle for invalidating a union security agreement

covering work in the State in advance of any discharge based upon it.[1]

The Company responds by ignoring the phrase "as a condition of employment in any State or Territory," interpreting the statute as if it read: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment [if] such execution or application is prohibited by State or Territorial law". Thus, in its discussion of the language and legislative history of § 14(b), Mobil abandons the rationale under which the majority below sustained the Company's position—that the union security law of the jurisdiction in which an employee is hired ordinarily governs[2]—in favor of the argument that "Congress specified that the law of the State where such agreements are to be executed or applied * * * will control." (Resp. Br., p. 16.) On the basis of this interpretation, the Company argues that since § 14(b) permits the states to proscribe either the "execution or application" of union security agreements, any state in which an agreement is "applied" in the sense that some action is taken by the employer pursuant to the agreement has a "sufficient interest" in vindicating its union

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[1] We note that the legislative history to which the Company refers (Resp. Br., p.15, n.18) gives no indication that Congress intended to permit a State to bar execution of a union security agreement if the agreement was not "to be performed" in that State, and that there is no suggestion in the legislative history of an intent, by altering the final language, to expand the authority of right-to-work States. (See H.Conf.Rep. No. 510, 80th Cong., 1st Sess., p. 60.)

[2] Indeed, the lesson the Company draws from the legislative history—"Congress thus evidenced its concern with the continued impact of union security clauses on employees *subsequent* to hire" (Resp. Br. p. 18; emphasis supplied)—is directly contrary to that of the majority below.

security policy to justify determining the validity of that agreement under its law. This would be the result, apparently, even when the agreement had been executed elsewhere, and even if all the covered employees' work was performed elsewhere.

The logical absurdity of this reading of § 14(b) is easily demonstrated. Here, the agreement was for all practical purposes executed in New York. (Pet. Br., p. 6; Resp. Br., pp. 7-8.) While we vigorously dispute the pertinence of most of the factors the Company claims show the agreement to be applied predominantly in Texas (pp. 5-7, *infra*), this case does illustrate that it is quite possible for an agreement to be executed in a union security state and applied in whole or in part in a right-to-work state. Under the Company's reading of the statute, either each of these states would have a statutorily protected right to vindicate its union security policy, even though it is impossible for the agreement to be at once valid and invalid, or the state with the right-to-work law would always prevail, even though this would violate the neutrality principle from which Mobil itself begins.[3]

In contrast, as explained in our opening brief (at pp. 24-25), it is the rare case in which the covered employees' work situs is so fractionated as to create a situation in which there is a substantial argument as to

[3] To mask this dilemma, the Company resorts to internally inconsistent statements. Thus, in full, its summation of its position (quoted in part above) is: "Congress specified that the law of the State where such agreements are to be executed or applied—that is, where the employment relationship is centered—will control." (Resp. Br., p. 16.) Obviously, the employment relationship cannot be "centered" in two different places, while execution and application can, as in this case, easily take place in two or more jurisdictions.

which jurisdiction's law applies. Normally, then, the work situs test clearly designates the governing jurisdiction, and does so in a neutral manner.

Thus, both the language and logic of § 14(b) suggest that the provision was written as it was precisely to focus the inquiry on the real center of the employment relationship—the place where the work is ordinarily done. And, despite the Company's protestations to the contrary (Resp. Br., pp. 26-28), the NLRB, the expert agency charged with the administration of the Act, has adopted the job situs test. For, the Board has relied on that location, falling back, only where it is impossible to fix that location, on the place where the "*employees* have *their* headquarters" (where they "report to work, receive their instructions and are paid their salaries"). [See Resp. Br., pp. 27-28, citing *Northland Greyhound Lines, Inc.*, 80 NLRB 288, 291 (1948)]. The Board has never sanctioned applying the law of the state where the *employer* has his headquarters. (See Pet. Br., pp. 26-28.)

2. Having, in our view, entirely misconceived the factor that justifies application of a state's right-to-work law, the Company then relies, in applying its test, on a series of supposed connections with Texas which, it proclaims, constitute "*all* the crucial aspects of [this] employment relationship". (Resp. Br., p. 19.) Yet, a review of the contacts with Texas reveals that almost all deal not with the employment *relationship*—that is, with the factors which describe how the employer and employees relate to each other or interact—but with unilateral actions of the employer and its supervisory employees.

For example, Respondent apparently sees some pertinence to the residence of the office staff of its Beau-

mont Gulf-East Coast Operations.[4] While it is at least possible, although we believe ultimately incorrect (Pet. Br., p. 20), that the residence of the employees actually *covered* by a union security agreement could have some relevance to its validity, it is inconceivable that the residence of employees of the employer who are *not* covered by the agreement can bear upon the agreement's legality. Similarly, we fail to see the pertinence, under any view of § 14(b), of where the employer has "datelined, written, edited, printed, published [or] mailed" its employee newspapers (Resp. Br., p. 7), puts money upon its tankers, mails paychecks, calculates union dues, mails union dues, or ultimately approves hiring and firing decisions made elsewhere (Resp. Br., p. 19). All of these actions are taken in Beaumont but are completed outside of Texas. For example, the effect on the covered employees of putting money on a tanker is felt when wages are paid on ship in a northern port. The Company's actions with regard to union dues is of financial consequence to the union only on receipt of the check in New York.

Further, as these illustrations show, Mobil has not only emphasized irrelevant contacts, but it has, in order to appear to have many contacts in Texas, fractionated into its details the one basic contact with Texas—that one of the employer's offices, which seems primarily to perform paperwork with regard to these employees, is in Beaumont. Clearly, since the Union

[4] The Company fails to mention that Gulf-East Coast also has two other offices, in New York and New Jersey, each with several office employees (App. 60, 74-75). Moreover, while the Company accuses us of "a deliberate effort to obscure the Texas seat of Respondent's operations" (Resp. Br., p. 3) by denominating the respondent in this case as "Mobile Oil Corporation", it is clear that Mobil Oil Corporation, and not an "operating unit" thereof, is the entity qualified to do business in Texas. (App. 6; Resp. Br., p. 20, n. 22.)

has a New York office, and since the Union is an equal party to the agreement and involved in its administration, Petitioner could have focused on similar details with regard to its New York office—for example, publishing the union newspaper, receiving union dues and negotiating and executing collective agreements with the Company. But such trivializing of "contacts", and such emphasis upon unilateral activities, does not illuminate the inquiry we see as central, viz., where is the *relationship* between the employees who are affected by the union security clause and the employer centered.

Moreover, even if the Company's asserted contacts were relevant to the present issue, these contacts hardly cover "all the crucial aspects of [this] employment relationship".[5] For the *most* critical aspect of that relationship, controlling in our opinion if it is readily determinable, is where the employees work and are supervised in their daily tasks; this factor is left out of the Company's calculus entirely. Aside from the discussion above indicating that the language and logic of § 14(b), as well as NLRB decisions, dictate that the place of work is paramount, it is evident that these parties themselves have considered their relationship to center upon the work aboard ship. For, as the Company's discussion of the collective bargaining agreement illustrates (Resp. Br., p. 23), almost all of the matters covered by that agreement relate to mat-

[5] Nor is it true that "it is not contended in this Court, nor was it contended in the courts below, that any state other than Texas has an interest in this employment relationship sufficient to justify application of its law to this employment relationship." (Resp. Br., p. 20.) We have continually maintained that even if our job situs test is rejected, on the Company's own theory at least some of these employees' employment relationship is centered in New York, and New York law must apply as to them. (Pet. Br., p. 39, n.12; see also U.S. Br., pp. 14-15; Pet. App. 30a, n.21.)

ters concerning these employees while aboard ship—discipline, working hours, meal hours, lockers, bedding, illness, work duties, etc. And, the collectively bargained agreement is surely the best embodiment of the parameters of the relationship between these parties.

Finally, the Company asserts that it "strains credulity to suggest" that its approach, with its focus on the *employer's* headquarters, could induce employers to locate their headquarters in right to work states. (Resp. Br., p. 32.) But the very fact that the Company instituted this declaratory action to invalidate an agency shop clause, when such a clause had never been declared invalid by any Texas court, when no employee was ever discharged because of the clause, and when, so far as the record shows, neither any employee nor any state official had ever questioned the clause's validity, surely suggests that this Company's interest in not operating under a union security agreement is great. Further, employers have historically led the fight to make union security clauses invalid, because union security is often the precondition for unions strong enough to limit management prerogatives. [See, e.g., Hearings before the Senate Committee on Labor and Public Welfare, 80th Cong., 2d Sess. (1947), pp. 393-394, 459, 534, 942 (Testimony on behalf of General Motors, United States Chamber of Commerce, and National Association of Manufacturers.)] Thus, employers generally, and this employer particularly, at least believe that union security clauses entail a significant cost to them, financial and otherwise. And since, under the Company's approach, the law of the state in which an employer's administrative headquarters is located would prevail even if *no* work is done there, it is not at all difficult, given modern communications, to imagine that employers would choose to place their administrative offices *away* from the "work force,

source of raw materials [and] relevant markets" (Resp. Br., p. 32), to escape union security clauses. While this does not appear to have been the case here, it would obviously be very difficult to prove an employer's motive in such a situation.

3. The Company maintains that "[a]doption of the situs test would result in judicial creation of an exception to Section 14(b)." (Resp. Br., p. 21.) The premise for this assertion is that the test would put seafaring employees beyond the reach of any jurisdiction as far as § 14(b) is concerned

Whatever may be the case with regard to other maritime employees, seamen who spend almost all of their working time on American flag ships plying the high seas, and not within the borders of any state are, like employees in the District of Columbia, working in a federal jurisdiction. (Pet. Br., pp. 28-38.) Since there *is* a law making authority, the federal government, with plenary and exclusive power to determine what union security policy should govern on the high seas, no exception to §14(b) is created by adoption of the job situs test.[6]

The Company perceives a conflict between our position and that of the Solicitor General in this regard. (Resp. Br., p. 22.) However, the Solicitor General's argument is directed at denying the propositions that "all maritime employment is outside the scope of State Power" and that "Section 14(b) * * * contains [an] exemption for maritime workers in general." (U.S.

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[6] The Company suggests that we are somehow arguing for a general exemption for maritime employees from the NLRA (Resp. Br., pp. 24-25). We do not believe that our opening brief can fairly be so read. To make assurances doubly sure, however, we specifically disavow any such intent, and state that the NLRA *does* apply generally to seamen who work on American flag vessels on the high seas.

Br., p. 14, n. 7.) As just noted, our argument is limited to the proposition that American flag vessels on the high seas are within an exclusively federal jurisdiction. Thus, our position does not purport to answer the question, which we regard as unsettled under this Court's precedents, of the extent of the states' authority concerning areas *within* their borders that are also within the federal admiralty jurisdiction, and acceptance of our view would not determine the extent to which a state right-to-work law would govern such maritime workers as "tugboat crews and crews of ships upon intrastate waterways". (Cf. U.S. Br., pp. 13-14.) [7]

Respondent seeks also to deprecate the two cases we regard as conclusive on the lack of authority of states to regulate the validity of an employment contract to be performed on the high seas, basically by noting that neither involved a collectively bargained labor agreement. (Resp. Br., p. 26.) We fail to see any conceivable relevance to this fact. It is a fundamental premise of the federal labor law that a collectively bargained agreement constitutes the sole and exclusive contract of employment between the members of a bargaining representative and the employer. (*J. I. Case Co.* v. *Labor Board,* 321 U.S. 332, 338-339.) The scope of the federal maritime jurisdiction as developed with regard to individual contracts between seamen working on the high seas and their employers must perforce apply to the interpretation and validity of collective bargaining agreements which are their equivalent.

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[7] While we have no basic problem with the Solicitor General's theory that there may be situations in which *no* jurisdiction has a sufficient interest in a given employment relationship to displace the federal rule embodied in § 8(a)(3), we do not believe there is any reason to address the viability of this theory in this case. For, here there *is* a legislative authority with a sufficient interest, under the job situs test, to assert its own union security policy.

CONCLUSION

For the reasons stated above, and in the Petitioners' opening Brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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